Prince Court Medical Centre Sdn Bhd v Germguard Technologies (M) Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(IM)(NCC)-1798–10 OF 2015
VERNON ONG, ABDUL RAHMAN SEBLI AND ABDUL KARIM ABDUL JALIL JJCA
16 JUNE 2016

Civil Procedure — Appeal — Application to produce new evidence — Appellant applied for leave to adduce new evidence at trial court — Trial court dismissed application — Appellant appealed against decision of trial court — Whether appellant entitled to adduce further evidence at the conclusion of main trial — Whether dismissal of application to adduce further evidence occasioned miscarriage of justice

This was an appeal against the decision of the trial court in dismissing the appellant's application for leave to reopen their case to adduce further evidence. After the conclusion of the main trial, and before the trial court pronounce its decision, the appellant indicated to the trial court that they had discovered fresh evidence and wished to make an application to reopen their case ('encl 71'). After hearing encl 71, the learned trial judge dismissed the application and proceeded to fix decision for the main action. The pronouncement of the decision had however been stayed pending the disposal of the present appeal. The respondent submitted that encl 71 was not merely to adduce fresh evidence or to recall witnesses but to amend the pleadings, to add parties, to discover by way of discovery, to inspect and to take copies of the documents and to raise a new cause of action which was beyond the original cause of action for breach of contract or abuse of process.

Held, dismissing the appeal with costs of RM2,000:

(1) The court agreed with the respondent's submission and stated that if the application under encl 71 were to be allowed, it will allow the appellant to rectify, repair or cover up any loophole in their case after having the benefit of evaluating the evidence of the respondent's witnesses and the respondent's submissions. This would be unfair to the respondent (see para 10).

(2) The discretion to allow party to reopen its case is a discretion that should be exercised sparingly and; should only be exercised in exceptional circumstances and to prevent a miscarriage of justice. Based on the facts and circumstances of the case, the court was not satisfied that there had

been a wrong exercise of discretion by the learned trial judge or that the refusal to allow encl 71 had occasioned a miscarriage of justice (see paras 11–12 & 14).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan mahkamah bicara dalam menolak permohonan perayu untuk izin membuka semula kes mereka untuk mengemukakan keterangan selanjutnya. Selepas kesimpulan perbicaraan utama, dan sebelum mahkamah bicara memberikan pendapat keputusannya, perayu menunjukkan kepada mahkamah bicara bahawa mereka telah menemui keterangan baru dan ingin membuat permohonan untuk membuka semula kes mereka ('lampiran 71'). Selepas mendengar lampiran 71, hakim bicara yang bijaksana menolak permohonan tersebut dan meneruskan dengan menetapkan keputusan bagi tindakan utama. Pengumuman keputusan walau bagaimanapun telah ditangguh sementara menunggu pendengaran rayuan ini. Responden berhujah bahawa lampiran 71 bukan sekadar untuk mengemukakan keterangan baru atau memanggil semula saksi-saksi tetapi untuk meminda pliding, untuk menambah pihak, untuk menemui melalui penemuan, untuk memeriksa dan mengambil salinan-salinan dokumen-dokumen tersebut dan untuk membangkitkan kausa tindakan terbaru yang mana melampaui kausa tindakan asal bagi kemungkiran kontrak atau penyalahgunaan proses.

Diputuskan, menolak rayuan dengan kos sebanyak RM2,000:

(1) Mahkamah bersetuju dengan hujahan responden dan menyatakan bahawa jika permohonan di bawah lampiran 71 dibenarkan, ia akan membenarkan perayu untuk membetulkan, membaiki atau untuk menutup apa-apa jalan keluar dalam kes mereka selepas mempunyai kelebihan menilai keterangan saksi-saksi responden dan hujahan responden. Ini akan menjadi tidak adil kepada responden (lihat perenggan 10).

(2) Budi bicara untuk membenarkan pihak untuk membuka semula kesnya adalah budi bicara yang patut dilaksanakan secara berhati-hati dan; hanya patut dilaksanakan dalam keadaan luar biasa dan untuk menghalang ketidakadilan. Berdasarkan fakta dan keadaan kes, mahkamah tidak berpuas hati bahawa terdapat pelaksanaan salah budi bicara oleh hakim bicara yang bijaksana atau bahawa penolakan untuk membenarkan lampiran 71 telah menyebabkan ketidakadilan (lihat perenggan 11–12 & 14).]

Notes

For cases on application to produce new evidence, see 2(1) *Mallal's Digest* (5th Ed, 2015) paras 1034–1037.

Cases referred to

Ratnam v Cumarasamy & Anor [1965] 1 MLJ 228, PC (refd)
Sykes v Sykes (1995) 6 BCLR (3d) 296, CA (refd)
Tan Kah Khiam v Liew Chin Chuan & Anor [2007] 2 MLJ 445; [2006] 4 CLJ 715; [2006] MLRA 246, CA (folld)

Appeal from: Civil Suit No 22NCC-199–09 of 2014 (High Court, Kuala Lumpur)

Malik Imtiaz Sarwar (Malik Imtiaz Sarwar) for the appellant.
TS Hariharan (Hariharan & Partners) for the respondent.

Abdul Rahman Sebli JCA:

[1] This appeal arose from the decision of the High Court at Kuala Lumpur which dismissed the appellant's application for leave to reopen their case to adduce further evidence.

[2] The application arose this way. After the conclusion of the trial of the main action and just before the High Court was about to pronounce its decision on 11 August 2015, the appellant indicated to the learned trial judge that they had discovered fresh evidence and wished to make an application to reopen their case. They followed this up by filing encl 71 on 21 August 2015.

[3] After hearing arguments, encl 71 was dismissed by the learned trial judge on 9 October 2015, whereupon he proceeded to fix decision for the main action on 13 November 2015. The pronouncement of the decision has however been stayed pending the disposal of the present appeal.

[4] The appellant did not include in the record of appeal the grounds, if any, given by the learned High Court judge for dismissing encl 71. We do not therefore have the benefit of the reasons for the dismissal of encl 71.

[5] To appreciate the nature of the appellant's application in encl 71, we feel it is necessary to reproduce, in their original form, the whole of the prayers in encl 71. They are as follows:

(1) The Defendant be permitted to re-open its case;

(2) That the documents exhibited as Exhibits CSL-1 to CSL-22 to the affidavit of Dr Chong Su-Lin affirmed on 20.8.2015 be received into evidence for the purpose of the claim and counterclaim herein, the same to be produced in a bundle referred to as 'Defendant's further Document';

(3) That the Defendant be granted leave pursuant to Order 20 r 5, ROC to

amend the Defence and Counterclaim as proposed in Annexure A to this Notice of Application;

(4) That the Defendant be granted leave pursuant to Order 15 r 3 and/or Order 15 r 6(2)(b) ROC to join Kailash Navinchandran Sheth (NRIC: 791206-01-6133) ('Kailash') and Divesh Navinchandran Sheth (NRIC: 751125-04-5083) ('Divesh') as Defendants to the Counterclaim and that the Amended Defence and Counterclaim be served on Kailash and Divesh within seven (7) days from an order hereof;

(5) That the Plaintiff, Kailash and Divesh do give discovery pursuant to Order 24 r 3, ROC by:

5.1 making and serving on the Plaintiff within fourteen (14) days of an order hereof a list of the documents which are or have been in each of their possession, custody or power in connection with the matters stated in paragraphs 34A, 34B, 34C, 40A, 40B, 40C, 41A, 41B and 41C of the Amended Defence and Counterclaim; and

5.2 make, file and serve an affidavit verifying the said lists within the same period.

(6) That the Plaintiff be granted leave pursuant to Order 24 r 9, ROC to inspect and take copies of the documents referred to in the said lists within a period of seven (7) days of the service of the lists;

(7) That the additional issues arising from paragraphs 34A, 34B, 34C, 40A, 40B, 40C, 41A, 41B and 41C of the Amended Defence and Counterclaim be tried and that further directions for said trial be given during a case management scheduled for that purpose;

(8) That this Honourable Court deliver its decision on all issues that arise from the claim and the counterclaim, including those that arise by reason of this order, after the trial of the additional issues and the filing of written submissions on those issues;

(9) The parties are granted liberty to apply;

(10) Costs of, and incidental to this application, be costs in the cause; and/or

(11) Any further and/or other order this Honourable Court thinks fit and appropriate.

The detailed grounds of this application are contained in the Affidavit in Support of Dr Chong Su-Lin filed herein and summarized as follows:

1. This application is being made in the interests of justice and with the aim of avoiding a miscarriage of justice.

2. The Defendant closed its case on 11.05.2015 and the parties completed the exchange and filing of written submissions on 22.06.2015.

3. On or about 25.07.2015, the Defendant came to know of further documentary evidence on which it can be concluded that the Plaintiff had through its director and shareholder, Kailash Navinchandran Sheth (NRIC: 791206-01-6133) ('*Kailash*') and Divesh Navinchandran Sheth (NRIC: 751125-04-5083) ('*Divesh*') procured the issuance of the letter of award dated 08.01.2008 ('the *LOA*') that is the subject of the Plaintiff's claim herein by unlawful means and for unlawful purpose. They had colluded with the then Chief Executive Officer, who was also a director of the Defendant, (the '*CEO*') and the then Chief Medical Officer (the '*CMO*') to have the LOA issued to the Plaintiff in return for the CEO and the CMO being paid a portion of the proceeds of the monies derived by the Plaintiff from the Defendant under the LOA.

4. They had concealed such matters and continue to do so.

5. This documentary evidence had grave implications and points to the Plaintiff attempting to procure an unlawful gain from the Defendant through this Honourable Court.

6. The Defendant believes that the ends of justice warrant this Honourable Court granting the orders sought herein which will allow all necessary issues to be determined.

[6] It was submitted by learned counsel for the respondent, and we agree with him, that encl 71 was not merely to adduce fresh evidence or to recall witnesses but to amend the pleadings, to add parties, to discover by way of discovery, to inspect and to take copies of the documents and to raise a new cause of action.

[7] We further agree with learned counsel that the appellant's proposed new cause of action which included fraud, breach of fiduciary and/or trust duties, conspiracy, rescission, constructive trustees, repayment et cetera are beyond the original cause of action for breach of contract (by the respondent as plaintiff at the trial) or abuse of process (counterclaim by the appellant as defendant at the trial).

[8] This backdoor way of changing the whole complexion of the appellant's defence to the claim and to their counterclaim after evidence by both sides had been adduced should not be countenanced by the court.

[9] In considering whether to allow or to disallow the appellant's appeal, we took guidance from the decision of this court in *Tan Kah Khiam v Liew Chin Chuan & Anor* [2007] 2 MLJ 445; [2006] 4 CLJ 715; [2006] MLRA 246 where Gopal Sri Ram JCA (as he then was) delivering the judgment of the court said:

> [6] In my judgment, the criteria for permitting a party at a trial to reopen its case for the purpose of either recalling a witness or calling fresh evidence are very different

from those that govern the statutory jurisdiction of an appellate court to receive further evidence ... What an applicant for further evidence at the appellate stage seeks to do is to persuade the court hearing the appellant that if the trial judge had had the further evidence before him, he may, or even would, have come to a different conclusion. But that is not the position at the trial. For temporally speaking, whether the trial judge may exercise his discretion to permit the reopening of a party's case will very much depend on the stage at which the application is made. It may be more likely that discretion may be exercised at the stage where the application is made immediately after a party closes his case. *But it may be less likely that discretion will be favourably exercised where the application is made after the defendants have closed their case and just before the trial judge is about to pronounce his judgment.* In the spectrum of factual possibilities that exist between each of these two extremes the exercise of discretion would, in my judgment, very much depend as to whether the justice of the case lies having regard to the peculiar facts and circumstances before the court.

[7] In contradistinction to the decision in *Yah bte Aji*, Arulanandom J in *Ong Yoke Eng & Anor v Lim Ah Yew* [1982] 1 MLJ 226; [1981] 1 LNS 162 held (so far as material to the present instance) that:

> In civil proceedings, it is in the discretion of the court of first instance to recall a witness or call further witnesses after his case is closed. Although under ordinary circumstances it may not be necessary or permissible ... unforeseen situations may develop and there may be also inadvertent omissions.

[8] In my judgment, the better view is that expressed in *Ong Yoke Eng*. A trial judge must be given a wide discretion on matters relating to evidence. After all, the Evidence Act 1950 itself places the matter of relevance and therefore admissibility upon the court, for it provides as follows in s 136(1):

> (1) When either party proposes to give evidence of any fact, the court may as the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the court shall admit the evidence if it thinks that the fact, if proved, would be relevant, and not otherwise.

[9] The view that I have taken is supported by the decision in *TD Canada Trust v McMaster et al* [2003] BCD (Civ) 16394, where Garson J said: In *Dudas v Munroe* [1993] BCJ 2035 (SC) (QL), Braidwood J (as he then was) summarised the law concerning the court's discretion to reopen a trial before judgment is entered as follows: In deciding whether or not to reopen a case, the governing considerations are first, would a miscarriage of justice probably occur without a rehearing; and second, would a rehearing probably produce a change of result?

The discretion to reopen a trial before judgment is entered is an unfettered discretion but one that should be used sparingly (*Sykes v Sykes* (1995) 6 BCLR (3d) 296 (CA)) and has its purpose the correction of what would otherwise be a miscarriage of justice (*Kemp v Wittenberg* 1999 BCJ 810 (SC)). (Emphasis added.)

[10] We take the view that if the application in encl 71 were to be allowed, it will allow the appellant to rectify, repair or cover up any loophole in their case

after having the benefit of evaluating the evidence of the respondent's witnesses and the respondent's submissions. This will not be fair to the respondent and is not how litigation should be conducted in our adversarial system of justice.

[11] Most importantly, the discretion to allow a party to reopen its case is a discretion that should be exercised sparingly: see *Sykes v Sykes* (1995) 6 BCLR (3d) 296 which the Court of Appeal cited with approval in *Tan Kah Khiam* referred to in para 9 above.

[12] The policy consideration behind this is obvious, and that is to avoid opening the floodgates for similar applications in the future. In cases such as the one before us, the discretion should only be exercised in exceptional circumstances and to prevent a miscarriage of justice.

[13] As the present appeal involves the exercise of discretion by the trial court, the following observations by Lord Guest in the Privy Council case of *Ratnam v Cumarasamy & Anor* [1965] 1 MLJ 228 at p 229 are relevant:

> The principles upon which a court will act in reviewing the discretion exercised by a lower court are well settled. There is a presumption that the judge has rightly exercised his discretion (*Charles Osenton & Co v Johnston* per Lord Wright at p 148). The court will not interfere unless it is clearly satisfied that the discretion has been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice (*Evans v Bartlam*).

[14] Although no grounds of decision were before us, on the facts and circumstances of the case, we were not satisfied that there had been a wrong exercise of discretion by the learned trial judge or that the refusal to allow encl 71 had occasioned a miscarriage of justice. It was for this reason that we dismissed the appellant's appeal with costs of RM2,000.

Appeal dismissed with costs of RM2,000.

Reported by Dzulqarnain Ab Fatar